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NOTES.

THE NORTHERN SECURITIES DECISION.—On March 14th the United States Supreme Court handed down a decision affirming the judgment of the Circuit Court for the District of Minnesota in the case brought by the United States against The Northern Securities Company, James J. Hill, J. Pierpont Morgan and others under the Sherman Anti-Trust Act of 1890. The decree provides for a complete rescission of the transaction whereby a majority of the shares of the capital stock of both the Northern Pacific and Great Northern Railways were acquired by the Securities Company which had been especially organized to hold them. Four opinions were delivered. The opinion of the court by Justice HARLAN was concurred in by Justices BROWN, MCKENNA and DAY. Justice BREWER, who concurred in the result, differed radically on several points. Dissenting opinions were delivered by Justices WHITE and HOLMES, while the Chief Justice and Justice PECKHAM also dissented.

Justice HARLAN pointed out that the Supreme Court has, in previous decisions, established the following propositions: (1) that the act applies to railroads; (2) that it forbids reasonable as well as unreasonable agreements and combinations in restraint of trade; and (3) that as so interpreted it is constitutional. None of the court seem to have questioned seriously the first proposition. On the second and third, however, Justice Brewer differed from his colleagues. The questions involved were argued exhaustively by very able counsel in *United States* v. *Trans-Missouri Freight Ass'n* (1897) 166 U. S. 290, and *United States* v. *Joint Traffic Ass'n* (1898) 171 U. S. 505, and were answered in the affirmative by a majority of the court in two able

opinions by Justice PECKHAM, in both of which Justice BREWER at that time concurred. Justice HOLMES also laid stress on this point. He contended that as the statute is criminal it should be strictly construed. It cannot, however, be assumed from the mere fact of their dissent in this case, that either the Chief Justice or Justice PECKHAM have changed their opinion on this point so forcibly expressed in the earlier cases. Justice Harlan's assertion that these three propositions are to be taken as settled law is therefore justified.

As we pointed out when discussing the judgment of the lower court, 3 COLUMBIA LAW REVIEW 404, there is an additional element involved in this case, and the Supreme Court might very well have reiterated the three propositions just mentioned, and yet have upheld this particular transaction. It is therefore not surprising to find Justice Peckham who wrote the opinion in both the Trans-Missouri and the Joint Traffic cases and Chief Justice FULLER who concurred in them, dissenting in the principal case.

This additional element—the vital point of the case, and the one which makes it of importance to the lawyer as well as to the business man or politician, is most clearly brought out in Justice HOLMES' dissenting opinion. The question which he finds it necessary to answer is this: Is the ownership of a controlling interest in the stock of two corporations competing for interstate commerce a direct restraint of trade? If its effect upon interstate commerce is indirect or incidental only it is not forbidden by this statute. *United States* v. *Joint Traffic Assn*, supra, p. 568. Justice HOLMES seems to agree with the defendant's contention that so long as the two roads retain separate boards of directors and are unfettered by any binding agreement as to rates or division of traffic there is no direct restraint of commerce. While a corporation is not legally "controlled" by its stockholders, as a matter of practice its directors act in accordance with the interests and wishes of the holders of a majority of the stock. As Justice HARLAN well said of the Securities Company: "No scheme or device could more effectively and certainly suppress free competition between the constituent companies."

Justice WHITE took still a different view of the questions at issue. To his mind they were: "Does the anti-trust act when rightly interpreted apply to the acquisition and ownership by the Northern Securities Company of the stock in the two railroads; and second, if it does, had Congress the power to regulate or control such acquisition and ownership?" His conclusion, based on an examination of the cases from *Gibbons* v. *Ogden* down to date, is that the delegation of authority to Congress to regulate commerce among the States does not embrace the power to regulate the ownership of stock in State corporations because such corporations may be in part engaged in interstate commerce. This conclusion might be admitted, however, without at all affecting the decision in this case. The evidence showed something more than mere ownership of stock in competing railroads. There was ownership acquired in pursuance of an agreement and the prevention of competition between the roads was one of its main objects. Justice HARLAN declined to express any opinion as to the legality of mere ownership of competing roads where the elements of agreement and intention are lacking.

If the question had been vital to the case the decision would probably have been against the Government, for Justice BREWER agreed with the dissenting justices on this point, and held that the general language of the act is limited by the power which the individual has to manage his own property and determine the place and manner of its investment. "Freedom of action in these respects," he said, "is among the inalienable rights of every citizen. If, applying this to the present case, it appeared that Mr. Hill was the owner of a majority of the stock in the Great Northern Railway Company, he could not by any act of Congress be deprived of the right of investing his surplus means in the purchase of stock of the Northern Pacific Railway Company, although such purchase might tend to vest in him through that ownership a control over both companies." The facts showed, however, an agreement or combination to destroy competition by pooling interests, and this prohibition of such combinations, Justice BREWER thought, is not at all inconsistent with the right of an individual to purchase stock. In other words, it is the combination or agreement which is the gist of the offense.

The law of the case would therefore seem to be summed up as follows:—

(1) An agreement between stockholders in competing corporations doing an interstate business, to form a holding company which shall acquire a controlling interest in each road and thereby destroy all motive for competition is "a contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States." Its effect on interstate commerce is direct and not merely incidental.

(2) In the absence of any contract, combination or conspiracy, it would seem that an individual may do with his own what he will even though as a result interstate commerce is directly restrained.

H. S. G.

A LIMITATION UPON THE RIGHT OF MUNICIPAL HOME RULE IN NEW YORK.—N. Y. Laws 1897, c. 415, § 3, provided that all laborers upon municipal works should receive not less than the prevailing rate of wages, that all municipal contracts for such works should contain a provision for the payment of such a wage-rate and that the entire contract should be void if this provision was violated. In *People* v. *Coler* (1901) 166 N. Y. 1, this statute was declared unconstitutional, in so far as it assumed to prescribe the terms of municipal contracts, upon the ground that it deprived both city and contractor of liberty of contract and violated the section of the New York Constitution forbidding any city to become indebted for any save city purposes. See 1 COLUMBIA LAW REVIEW, 315. A clause of the same statute requiring a provision for an eight-hour working day in all public contracts was held invalid, as denying contractual freedom to the contractor, in *People* v. *Road Construction Co.* (1903) 175 N. Y. 84. Both of the foregoing decisions were rendered by a divided court, five judges concurring and two dissenting in the Coler case and four concurring as against three dissenting in *People* v. *Road Construction Co.*